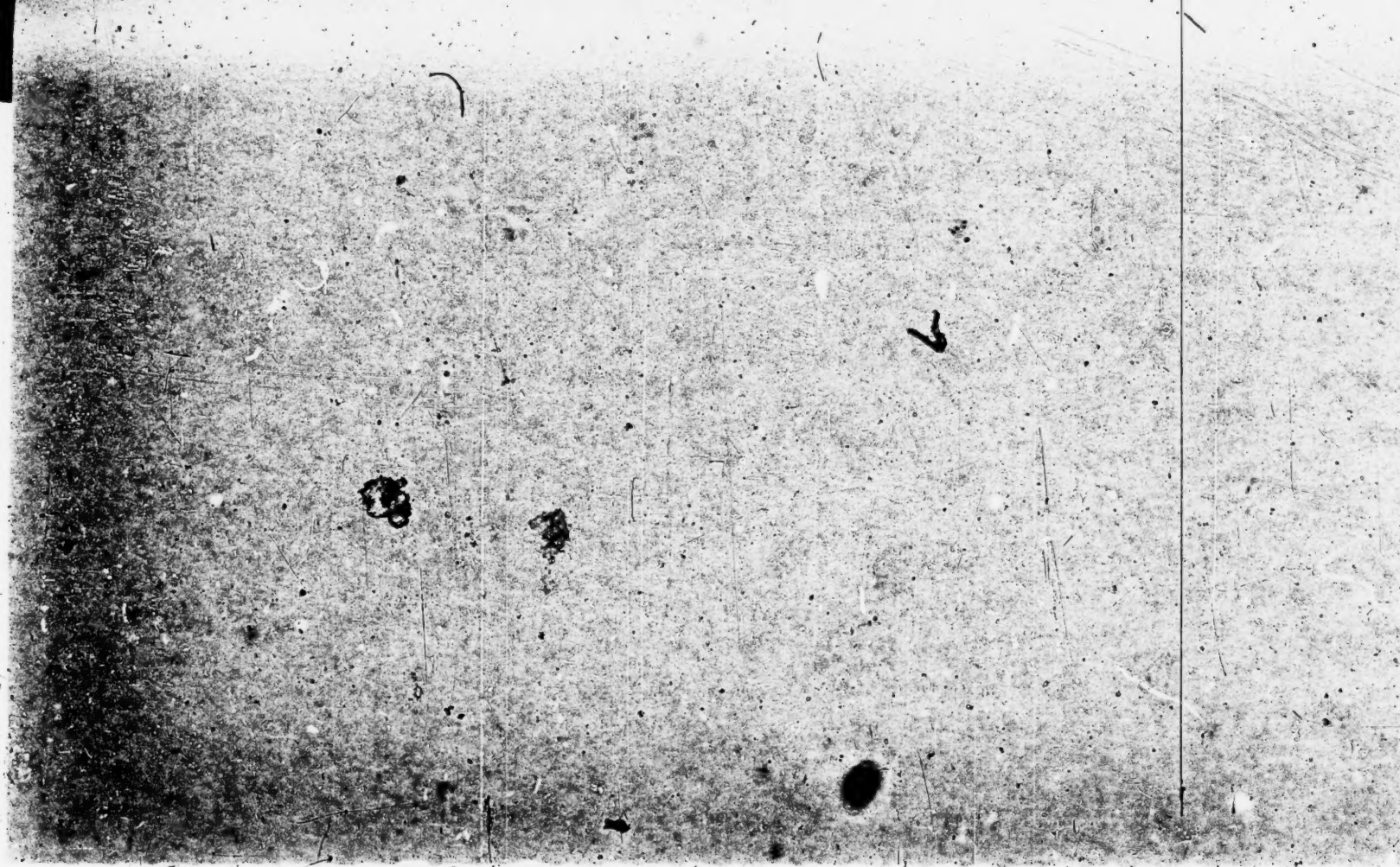


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MOTION FILED - DEC 30 1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 604

SKIBS, A/S MARIE BAKKE,

Petitioner,

vs.

OTIS, McALLISTER & CO., a Corporation,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

AND

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI.

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*.

Grace Line Inc., Isthmian Lines, Inc., States Marine Corporation and United States Lines Company hereby respectfully move this Court for leave to file the attached brief as *amici curiae* pursuant to Rule 42, Paragraph 1, in support of the petition for certiorari filed on or before December 29, 1958. The consent of the petitioner to the filing of such brief has been obtained, but the respondent has refused its consent.

The question involved is whether our Carriage of Goods by Sea Act, 1936, 46 U. S. C. 1300 et seq., which applies to shipments from or to this country in foreign trade renders bill of lading "invoice clauses" invalid. The Court of Appeals, reviewing the District Court, held such a clause invalid.

Thus the interpretation of a Federal Statute is involved.

Such clauses are found in the vast majority of all ocean bills of lading, domestic and foreign. For many years

carriers had expected to adjust and have adjusted claims for loss or damage to goods on that basis.

Indeed, there is great practical advantage in a carrier's being in a position to adjust claims on the basis of invoice value. That value is usually fixed and appears from the claim file. If sound market value be the test uncertainty and dispute will or may result and cause delay and difficulty in the adjustment of claims.

The question of the validity of such clauses not only affects carriers in foreign trade, their underwriters, but importers and exporters throughout this country and their underwriters.

In *Model Ocean Bill of Lading* by *Deutsch*, published subsequent to the Act, it is said at page 164:

> "The most usual provision, aside from a limitation to a fixed value per package or unit, is one limiting the carrier's liability to invoice valuation or fixing the value of the merchandise for the purpose of determining the carrier's liability at the invoice value."

Such a clause is inserted in what the author considered a model bill of lading appearing in his book.

The Warshiplading, 1942, used for the carriage of goods on merchant vessels operated for the Government account by the War Shipping Administration and its agents and later by the National Shipping Authority and its agents contained an invoice value clause with respect to goods of a value of less than $500 per package or other freight unit. *Knauth, Ocean Bills of Lading*, pages 93, 106.

An illustration of the importance of the question can readily be seen from the following quotation from the motion filed in the case at bar, in the Court of Appeals for leave to file a brief *amicus curiae* on behalf of the Institute

of Marine Underwriters of the United States, "a nation-wide organization composed of virtually all marine insurance companies in the United States who write insurance on cargo moving to and from this country by sea."

> "• • • The decision herein will therefore affect not only the particular importer and carrier involved, but all importers, exporters, carriers and their agents, throughout the United States, who engage directly or indirectly in foreign commerce by water. • • •
>
> "The extent of common carrier liability is of direct concern to cargo underwriters who normally must bear these losses for which the carriers need not respond. For that reason the Institute of Marine Underwriters is vitally interested in the interpretation of the Carriage of Goods by Sea Act. • • •"

The effect of these clauses comes into play daily in the handling and negotiation of claims between shippers, consignees, marine underwriters and carriers.

This Court, in *U. S. A.* v. *Atlantic Mutual Ins. Co. et al.*, 343 U. S. 236, granted certiorari to determine the validity of the so-called "Both-to-Blame" clause in bills of lading, stating at page 239 of its opinion in the case:

> "• • • deeming the question of sufficient importance to justify our review, this Court granted certiorari."

We submit the very important question here involved should be settled by this Court.

The interest of the proposed *amici curiae* is that they are steamship companies engaged in domestic and foreign commerce, and all issue bills of lading containing "invoice value" clauses in some form. Thus the decision of the

Court of Appeals below declaring the invoice value clause invalid under the United States Carriage of Goods by Sea Act, 1936 seriously affects them, as well as the whole of the maritime industry engaged in the carriage of goods by water.

The *amici curiae* move this Court for permission to file the annexed brief to emphasize the importance of the question here involved and to point out additional reasons why certiorari should be granted by this Court.

WHEREFORE, it is respectfully submitted that the movants be permitted to file the annexed brief as *amici curiae* in support of the petition for certiorari.

Dated, New York, N. Y.
December 29th, 1958

Respectfully submitted,

L. DEGROVE POTTER,
Counsel for
Grace Line Inc.,
Isthmian Lines, Inc.,
States Marine Corporation,
United States Lines Company.

JAMES MCGARRY,
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IN THE

Supreme Court of the United States

OCTOBER TERM 1958.

SKIBS, A/S MARIE BAKKE,

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OTIS, McALLISTER & Co., a Corporation,

Respondent.

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI.

The question involved here is whether the Carriage of Goods by Sea Act, 1936, 46 U. S. C. 1300 et seq. (hereinafter referred to as COGSA) prevents the parties to an ocean bill of lading from agreeing that in the event that the carrier is liable for cargo loss or damage that the value of the goods will be based on their invoice value; or whether COGSA has rendered null and void invoice value clauses which this Court has held to be valid under the Harter Act in *Smith v. The Ferncliff* (1939), 306 U. S. 444.

The *amici curiae*, Grace Line Inc., Isthmian Lines, Inc., States Marine Corporation and United States Lines Corporation, have a deep interest in the resolution of this question since they all issue bills of lading containing "invoice value" clauses.

THE FACTS.

The respondent, an importer, sued for damage occurring to his cargo, on board the petitioner's vessel on a voyage

from South America. The District Court rendered a decree for respondent and computed the damages based on an invoice value clause in the bill of lading, which the District Court held to be valid. On appeal, the Court of Appeals for the 9th Circuit reversed the District Court and held that the invoice value clause was one lessening the carrier's liability for negligence and was null and void under Section 3 (8) of COGSA.

ARGUMENT.

The question of the validity of invoice value clauses under COGSA is one of great importance to the whole maritime industry. Invoice value clauses in some form are contained in the bills of lading of all the *amici curiae*, which are among the world's large ocean cargo carriers, and are engaged in cargo carriage to various parts of the world.

Additionally, the undersigned represents many other foreign, as well as domestic, steamship companies to most, if not all, of whom the decision of this question is of importance. Furthermore, the Warshiplading form, which has been the uniform bill of lading for the War Shipping Administration and the National Shipping Authority and its agents, as found in *Knauth* on *Ocean Bills of Lading*, 4th Ed., pp. 93 to 109, contains, at pp. 105 and 107 an invoice value clause. One also appears in Deutsch's "Modern Ocean Bill of Lading".

Clearly then, the clause involved in the case at bar is not merely one of importance to the litigants. It is one which affects the maritime industry as a whole, in the area of cargo carriage. The decision of the validity of this clause under COGSA will affect all ocean carriers in foreign commerce with respect to any shipment touching United States shores since COGSA governs both inbound and outbound shipments.

Under the decision of the court below the effect of an "agreed valuation" type of invoice value clause will prevent the carrier from "lessening" its liability, but if the invoice value be greater than sound market value (the measure of damage in the absence of agreement) cargo may contend the carrier has agreed to increase its liability which it may do. So, the only effect of the clause would be to increase the carrier's liability in some cases. Many invoice value clauses, are of this type. Certainly this was not the purpose or intent of carriers in inserting such clauses.

Also the effect of the decision below would result in such clauses being invalid in foreign trade, but valid in coastwise trade as the Act only applies to foreign trade. Such a result is quite unwarranted.

Since these invoice value clauses affect the measure of damage in the event ocean carriers are liable for cargo loss or damage, the validity of such clauses must also be of vital importance to cargo shippers, consignees, and marine underwriters.

It is imperative that ocean carriers be apprised of the efficacy or validity of such clauses, especially in view of the fact that such clauses appear in the great majority of their bills of lading. Doubt on the efficacy of such clauses can lead only to increased difficulties and roadblocks in the speedy disposition of claims with resultant increased litigation.

Therefore, it is submitted that these *amici curiae*, whose activities are national and international in scope have demonstrated the overwhelming importance of the question presented and the necessity that this Court finally set at rest this question which involves the interpretation of a Federal Statute and therefore grant certiorari.

We shall not include in this brief detailed argument as to the correctness of the Court of Appeals' decision reversing the District Court but nevertheless we submit the decision of the Court of Appeal is wrong. The last pronouncement of this Court on invoice value clauses was in the case of *Smith* v. *The Ferndiff* (1939), 306 U. S. 444. In that case, this Court held such a clause to be valid. Although COGSA had been passed and was in effect at the time of this Court's decision, the case arose prior to the effective date of COGSA and under the Harter Act.

The late Charles S. Haight, in testifying before the Committee on Merchant Marine and Fisheries of House of Representatives, 74th Congress, 2d Session, Bill S. 1152, January 28, 1936 (p. 71), in hearings on COGSA, quoted Judge Hough as saying:

> "If I had undertaken to codify the American law myself, I could not have done a better job."

It is significant that while the Act expressly prohibits a "benefit of insurance" clause [§3 (8)] it does not prohibit a limitation of liability to invoice value with respect to goods of a value less than $500 per package or customary freight unit.

Prior to the passage of the Act such clauses were valid. If Congress had intended to invalidate such clauses it would have been very simple to have so provided in the Act. A few words would have sufficed. The fact that Congress did not so provide is convincing evidence that it did not intend to prohibit such clauses, particularly having in mind their long and almost universal use.

This Court has never passed upon the question whether COGSA has invalidated invoice value clauses or changed the law that existed under the Harter Act. Therefore, the only outstanding decision of this Court on the question of

invoice value clauses is *The Ferncliff, supra,* and that case held such clauses to be valid. If, in fact, COGSA has changed the law from that as found in the *Ferncliff* case, which is by no means admitted, it is submitted that this Court should now decide the question, particularly since it is one of great importance to all connected with the shipment and carriage of goods by water in foreign commerce to and from ports of the United States.

This Court has recently granted certiorari on similar questions or questions dealing with the effect or interpretation of COGSA.

In *Robert C. Herd & Co.* v. *Krawill Machinery Corp.* (4 Cir., 1958), 256 F. (2d) 946, this Court recently granted certiorari on October 13, 1958, 1958 A. M. C. 2327, on the question of whether or not the $500 per package limitation of the Carriage of Goods by Sea Act, 46 U. S. C. §1304 (5) and a similar provision contained in a bill of lading applies to a stevedore.

This Court has also granted certiorari on October 13, 1958, 1958 A. M. C. 2327 on the question of the validity of a bill of lading clause providing that suits for cargo damage were to be brought only in Genoa, Italy. *Carbon Black Export* v. *The SS. Monrosa* (5 Cir., 1958), 254 F. 2d 297.

It is submitted that the question involved here is of, at least, equal, if not of greater importance to the industry than the questions involved in the above cases.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be granted.

Respectfully submitted,

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States Marine Corporation,
United States Lines Company.

Dated, New York, N. Y.,
December 29th, 1958

James McGarry,
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